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Peter Goodrich
Benjamin N. Cardozo School of Law, goodrich@yu.edu

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HABERMAS AND THE POSTAL RULE

*Peter Goodrich**

> Who is writing? To whom? And to send, to destine, to dispatch what? To what address? Without any desire to surprise, and thereby to grab attention by means of obscurity, I owe it to whatever remains of my honesty to say finally that I do not know.[1]

INTRODUCTION

It seems somewhat churlish at the end of so much discussion, at the terminus of the circulation of so extensive a commentary and critical appraisal of a single text, to offer further doubts, to intimate certain additional, and worse, extraneous criticisms of Jürgen's contribution to jurisprudence. Nonetheless, there is a tangible theme of misunderstanding, noncomprehension, and failed communication that has accompanied the debate in this conference and can act as the proximate emblem of the following intervention. This essay will simply suggest that there is little in Habermas's study of legal discourse and of the conditions under which the rule of law may be possible that either pertains to law or could be otherwise related to the institutions or classifications of any contemporary jurisprudence. This paper will therefore offer a laconic, ephemeral, and possibly cryptic commentary upon a certain tone in Jürgen's recent works.

The argument to be addressed is concerned with the attraction and antagonism of opposites. The great communicating machine—the *oeuvre* of the master, the *corpus Habermasianae* and its epigonal texts—is caught up in the inexorable trajectory of communication—its failure, its silence, its dissolution. There is a logic of opposites which arguably entails the thesis that a theory devoted to the elaboration of the criteria of ideal speech situations must itself be the product of a certain experience of noncommunication. It could even be argued that the *oeuvre*, the publication of book upon book by Jürgen, of commentary upon commentary upon Habermas, is testimony to a species of peculiarly academic noncommunication.

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* Corporation of London Professor of Law, Birkbeck College, University of London.

[1] JACQUES DERRIDA, THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND 5 (Alan Bass trans., 1987).

At a philosophical level, it can simply be observed that there is no small paradox, perhaps even an irony, to a "postmetaphysical" thought which advocates—in a comprehensively abstruse and impractical manner—a return to the most metaphysical of positions, pragmatism or belief in the *pragmata*, in real things, and the "obscure structure" of their investiture with value which the post-Hellenistic tradition termed practice, and which the legal tradition defined as a faith in instruments.[2] At a political and cultural level, there is a further curiosity to a theory of communicative rationality predicated so directly and essentially upon polemic, upon the defense or apologetics of reason as against the irrationalists, the conservatives, the postmodernists, the heretics, the nomads and the outsiders, the Jews.[3] The apology, and Jürgen is frequently and most forcefully apologetic, is the opposite of an ideal speech situation and is predicated upon a manifest fear that precedes and arguably negates rational discourse. It is predicated either on a "nihilating" desire to silence, to vanquish, an opponent or upon a species of nemesis complex, a totalising desire to see an end to nonrational communication. There is thus, finally, the suspicion that, underlying the polemical demonstration of the theory of communicative rationality, there is a return to the reason of the schools, to the antinomies of the antirrhetic, to a quest to explicitly define the indefinable and so bring communication to rest.

The logic of opposites entails a certain skepticism whereby the projection of discursive rationality upon the external world is taken to be but one mark of an internal incoherence, an inchoate or repressed irrationality. The external figure, the concerned and almost avuncular Jürgen, the famous man now involved in a protracted ceremony of *quæstiones disputatæ*, of *responsa* and rulings, glosses and *brocardica*, is forced to exclude those who do not go along with the theory, the communicative law according to Habermas. To participate is to adopt the prejudice of the Habermasian, to believe that communication will pass from sender to receiver, that there will be—in Bracton's formulation—both *animus donandi* and *animus recipiendi* whereby or by means of which

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[2] For Habermas's most recent—and also most antique—statement on pragmatics, see JÜRGEN HABERMAS, POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS 57-112 (William M. Hohengarten trans., 1992). On the etymology of the *pragmata*, see MARTIN HEIDEGGER, BEING AND TIME 96-97 (John Macquarrie & Edward Robinson trans., 1962), and more generally EMILE BENVENISTE, INDO-EUROPEAN LANGUAGE AND SOCIETY 144-46 (Elizabeth Palmer trans., 1973).

[3] The most explicit polemics are to be found in JÜRGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY (Frederick Lawrence trans., 1987).

the gift, *certa res*, is passed from one to another, from Habermas to his reader and from speech to writing without loss of sense, poetic license, or art or fluidity of meaning.[4] Indeed, Bracton also remarks of the law of exchange that "a gift [*certa res*, a meaning] may be proved more easily and more effectively by a writing and instruments than by witnesses or suit."[5] To have faith in an instrument is in law a matter of proof and of credibility, a question of prior consent, of a shared *animus* between the contracting parties—*personas contrahentium*—and so too of a faith in the instruments of communication, a matter *de fide instrumentorum*, of subservience to the legal definition of a language of assured transmission.[6] It is thus necessary to believe in a certain innominate contract, a stipulation, a predefined assurance, an agreement prior to agreement which determines in advance and by a quite inexplicit faith that the message will arrive, that question and answer, *pro et contra*, will eventually lead to agreement, to meaning, to certainty and discursive rationality.

There is of course another—rather impolite—possibility, which is that the concept of communication at play in the exchange, the disputation, the publication, or the conference is itself somewhat arbitrary, slightly stupid, unavailing, exhausted, and soon lost. The issue for those that come before or to the side of Habermas, before or outside the law of communicative rationality, becomes the price of this discourse, as well as its sinister acts of concealment, repression, loss, or forgetting. Then, of course, there is the danger, inherent in the very act of communicating and in the possibility of transmission, that the message may not arrive at any calculable place: "[o]nce intercepted—a second suffices—the message no longer has any chance of reaching any (*determinable*) person, in any determinable place whatever."[7] Furthermore, it is inherent in the structure of the transmission that it may end badly, that it may end soon, and that it may have meant very little and have been quite uncertain from the start.

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4 2 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ [ON THE LAWS AND CUSTOMS OF ENGLAND] 62-63 (George E. Woodbine ed. & Samuel E. Thorne trans., 1968) (1256).

5 *Id.* at 62.

6 On "the faith which attaches to instruments," see Yifat Hachamovitch, *The Ideal Object of Transmission: An Essay on the Faith Which Attaches to Instruments* (de fide instrumentorum), 2 LAW & CRITIQUE 85 (1991); *see also* Peter Goodrich, *Rhetoric, Grammatology and the Hidden Injuries of Law*, 18 ECON. & SOC'Y 167 (1989).

7 DERRIDA, *supra* note 1, at 51.

Derrida, mimicking certain passages from *On the Future of our Educational Institutions*,[8] remarked quite appropriately that these are not issues that can be determined in advance:

> Because I still like him, I can foresee the impatience of the *bad* reader: this is the way I name or accuse the fearful reader, the reader in a hurry to be determined, decided upon deciding (in order to annul, in other words to bring back to oneself, one has to wish to know in advance what to expect, one wishes to expect what has happened, one wishes to expect (oneself)). Now, it is bad, and I know no other definition of the bad, it is bad to predestine one's reading, it is always bad to foretell. It is bad, reader, no longer to like retracing one's steps.[9]

And yet the contract of communicative rationality is precisely the predetermination of the outcome of discourse, the legislation—or, in private law terms, the stipulation—of agreement through the formulaic words or rites of exchange, through the institution, or better the power, of meaning.

The good reader, the one who retraces her steps, who takes risks, who believes in inscription, in the pain and the labour of writing, is one who will always doubt the clarity, the coincidence, the power, and the privilege of communicative reason. In short, those who still wish to think, to fight, to accept the noncoincidence of transmission and transmitted, will always challenge discursive law in the name of a certain poetry of survival.[10] It may even be possible to reinvoke the more radical politics of reform, the politics of those who are not yet decided upon deciding nor yet given up to a faith in the instruments of communication. It might be recollected that both protestant and recusant, divine and dissenter, were prone

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[8] FRIEDRICH NIETZSCHE, ON THE FUTURE OF OUR EDUCATIONAL INSTITUTIONS 3-5 (1910):

> This book is intended for calm readers—for men who have not yet been drawn into the mad headlong rush of our impatient age and who do not experience any idolatrous delight in throwing themselves beneath its chariot wheels. It is for men, therefore, who are not accustomed to estimate the value of everything according to the amount of time it either wastes or saves. In short, it is for the few. These we believe still have time. . . . No one among them has yet forgotten to think while reading a book; he still understands the secret of reading between the lines . . . . And he does this, not because he wishes to write a criticism of it or even another book; but simply because reflection is a pleasant pastime.

[9] DERRIDA, *supra* note 1, at 4.

[10] For a striking example of this argument, see PIERRE LEGENDRE, PAROLES POÉTIQUES ÉCHAPPÉES DU TEXTE 212 (1982), discussing the loss of the art of law, of the poetics of the institutional text, and of "the great imaginings of power, those which made the body walk with the soul, that is to say those which mobilized the unconscious to an awareness of death, [and] which could only be said poetically." *Id.* (my translation).

to formulate the politics of faith in terms of different forms of communicative reason—sign, presence, and annunciation. Thus Thomas Harding, paraphrasing St. Ambrose, advised the believer in preparation for encounter with the heretic

> to beware of him, for that he endeavours to prove his false doctrine *versutis disputationibus*, with subtle and crafty reasonings . . . [and] alleges to that purpose *cavete ne quis vos depraedetus per philosophiam*. Beware that no man spoil you through philosophy and vain deceit . . . . For these heretics put all the force of their poisons in logike, or dialectical disputation, which by the opinion of philosophers is defined not to have power to prove, but an earnest desire to destroy and disprove.[11]

The advice may cause us to recollect that reason has traditionally been the object of institutional authority, that reason—ideal speech situation or discursive rationality—is the law of the text and of its legitimate reproduction, and that communicative reason, like legal judgment, does not admit of the possibility of any failure of meaning. The argument to be pursued in the present commentary will reverse that order of privilege and suggest that, in one of its most fundamental forms, the legal contract, reason, meaning, text, and transmission are all equally precarious and equally likely to escape the stipulations of communicative rationality. Inscribed in the very possibility of communication are the possibilities of excess, loss, uncertainty, or simple escape.

I. Sending On

The following example is taken from the law of contract. It concerns the much remarked anomaly that, while contracts are the result of consensus and thus depend upon communication between the parties, an acceptance is binding in law once put in the post. In one relatively early formulation, "where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even [ ] though it never reaches its destination."[12] The logic of the postal rule, or, in its American terminology, the "mailbox rule,"[13] is somewhat uncertain. The origin of the rule in Anglo-American case law is gen-

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11 St. Ambrose, as adapted in Thomas Harding, A Confutation of a Booke Intituled an Apologie of the Church of Englande fol. 32b - 33a (1565).

12 Byrne & Co. v. Leon Van Tienhoven & Co., 5 C.P.D. 344, 348 (1880) (citations omitted).

13 For a useful and extensive discussion of the issue in American law, see generally Morrison v. Thoelke, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963); John P. Dawson et al., Cases and Comments on Contracts 382-394 (4th ed. 1982); E. Allan Farnsworth,

erally thought to be the early nineteenth century decision of the King's Bench in *Adams v. Lindsell*.[14] The rule in *Adams* was doctrinally grounded by the observation that a necessarily arbitrary cutoff point must be imposed in relation to communication. If such a point of no return were not enforced, then as noted by the court,

> no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*.[15]

Explanations for the rule are various and will be briefly reviewed. If nothing else, the absence of any plausible, let alone satisfactory, justification for the postal rule generates continued academic debate.[16] Most commentators accept that the rule, which has covered letters and subsequently the telegraph—the decision of the Massachusetts Supreme Court in *McCullough v. Eagle Insurance* and the historically misconceived decision in *Rhode Island Tool Co. v. United States* notwithstanding[17]—is here to stay.[18] It is only in the area of the potential adoption or disavowal of the rule in relation to more recent technologies where justifications for the rule retain their importance. As it stands, however, the rule has important practical and conceptual consequences, despite the fact that such arbitrary line-drawing has been viewed by most commentators as, at best, an ill-conceived concession to the needs of business certainty, and, at worst, as irrational by virtue of being inconsistent with the consensual principles of contract formation.

In brief doctrinal terms, the mailbox rule is an exception to the requirement that the formation of a contract result from the volun-

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CONTRACTS 180-85 (2d ed. 1990); Karl N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 792-98 (1939).

14 [1818] 1 B. & Ald. 681, 19 Rev. Rep. 415; *see also* Henthorn v. Fraser, [1892] 2 Ch. 27; Holwell Sec. Ltd. v. Hughes, [1974] 1 W.L.R. 155.

15 *Adams*, 1 B. & Ald. at 683.

16 *See* Simon Gardner, *Trashing with Trollope: A Deconstruction of the Postal Rules in Contract*, 12 OXFORD J. OF LEGAL STUD. 170 (1992); *see also* PETER GOODRICH, *Contractions: A Linguistic Philosophy of the Postal Rule*, *in* LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS 149 (1990); Costas Douzinas & Ronnie Warrington, *Posting the Law: Social Contracts and the Postal Rule's Grammatology*, 4 INT'L J. FOR SEMIOTICS LAW 115 (1991).

17 McCullough v. Eagle Ins. Co., 18 Mass. (1 Pick.) 278 (1822); Rhode Island Tool Co. v. United States, 128 F. Supp. 417 (Ct. Cl. 1955).

18 *See* G. TREITEL, THE LAW OF CONTRACT (1991); PATRICK S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 77 (1989); Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft G.m.b.H., [1983] 2 App. Cas. 34.

tary assumption of obligations by the parties. For the contract to be adequately consensual, for there to be *consensus ad idem*, or a meeting of minds, it is necessary for the substance of both offer and acceptance to be brought to the notice of the relevant party either by explicit words or by conduct or behaviour that can be deemed to have the same communicative effect. What is required of both words or actions is that they come to the knowledge or notice of the other party.[19] That a posted acceptance escape this rule is illogical, but is presented in the case law as either an aspect of the law of agency or as a feature of the fiction of continuing assent.

The principle of agency is adapted from the Roman law of sale. Once the letter or message is placed in the hands of the authorized messenger, then the master or sender is deemed to have entrusted the messenger with the communication, and it is assumed that the bare messenger or sender will effect the communication. The agency principle appears in American case law in the form of a line drawn at the point where the message leaves the control of the sender. In *Lucas v. Western Union Telegraph Co.*, for example, the justification for viewing the moment of mailing (i.e., entrusting the communication to the messenger) as being the moment that the acceptance takes effect is that "[t]hereafter the acceptor has no right to the letter and cannot withdraw it from the mails. Even if he should succeed in doing so the withdrawal will not invalidate the contract entered into."[20] A similar view is also evident in English case law from early in the history of the rule:

> The acceptor, in posting the letter, has . . . "put it out of his control and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound." How then can a casualty in the post, whether resulting in delay . . . or in non-delivery, unbind the parties or unmake the contract? . . . If he [the offeror] trusts to the post he trusts to a means of communication which, as a rule, does not fail.[21]

The additional justification—the fiction of continuing assent—adds conceptual legitimacy to the empirical observation of the general trustworthiness of the postal service. This principle was derived from the earlier decision of *Cooke v. Oxley*, which designated a mailed offer as a continuing offer based on the fiction that at each moment of transmission the offeror renewed his or her consent and

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19 A classic example of the application of this principle is Dickinson v. Dodds, 2 Ch. D. 463 (1876).

20 Lucas v. Western Union Tel. Co., 109 N.W. 191, 192 (Iowa 1906); *see also* Tuttle v. Iowa State Traveling Men's Ass'n, 104 N.W. 1131 (Iowa 1905).

21 Household Fire and Carriage Accident Ins. Co. v. Grant, [1879] 4 Ex. D. 216, 223.

that the assent of the offeree constituted an irreversible meeting of minds.[22]

The textbook explanations of the postal rule are either mutely resigned or straightforwardly cynical in tenor. For Corbin, who presents an exemplary exposition, the explanation is empirical: "A better explanation of the existing rule seems to be that in such cases the mailing of a letter has long been a customary and expected way of accepting the offer. It is ordinary business usage."[23] Corbin adds that, while there may be inconvenience occasionally engendered, "[w]e need a definite and uniform rule as to this."[24] For Llewellyn, the question of the justification of the mailbox rule was best addressed pragmatically:

> [T]he vital reason for throwing the hardship of an odd delayed or lost letter upon the offeror remains this: the offeree is already relying, with the best reason in the world, on the deal being on; the offeror is only holding things open; and, in view of the efficiency of communication facilities, we can protect the offeree in *all* these deals at the price of hardship on offerors in very few of them.[25]

The judicial reiteration of these explanations adds little more to the search for clarity than a sense of habitual caution. As recently as 1983, Lord Fraser summarized the view of the majority of the House of Lords on the distinction between telex and post in logical terms no more compelling than the observation that the rule seems to have worked without leading to serious difficulty or complaint from the business community.[26] In *Holwell Securities Ltd. v. Hughes*, the arbitrariness of the rule, or at least the apparent idiosyncracy of its continued usage, was so pronounced as to prompt Lord Justice Lawton to assert a vague but doubtless deeply felt limitation to the rule, namely, that it was not to be applied where its application would lead to absurdity: "The rule does not apply if, having regard to all the circumstances, including the nature of the subject matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting the offer had in fact communicated ac-

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22 *See* Cooke v. Oxley, 3 Times Reports 653 (1790); *see also* the discussion in Morison v. Thoelke, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963). This explanation of the rule is also rehearsed in E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 944-46 (1967).

23 ARTHUR L. CORBIN, CORBIN ON CONTRACTS 125 (1952).

24 *Id.* at 126.

25 Llewellyn, *supra* note 13, at 795.

26 *See* Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft G.m.b.H., [1983] 2 App. Cas. 34.

ceptance."[27] Underlying such a view is most probably a simple sense of historical incomprehension—why continue to apply an archaic and anomalous rule when it seems to have lacked any logical necessity even at the time of its inception? As one court famously remarked in the course of a failed attempt to overturn the rule:

> To apply an outmoded formula is not only unjust, it runs counter to the whole stream of human experience. It is like insisting on an oxcart as the official means of transportation in the age of the automobile. The cart served a useful purpose in its day, but is now a museum piece . . . . The reason for the rule ha[s] disappeared.[28]

Both in the textbooks and in the courts, however, the balance of habit and reaction, tradition and deference to precedent, tips the scales imperceptibly towards continued adherence to the rule.

Attempts to find some more rational explanation of the postal rule range from the historical to the literary and from the economic to the psychoanalytic.[29] Starting with the latter, a mid-1930s article by an American professor, Artur Nussbaum, suggested that criticism of the postal rule, and of the decision in *Adams v. Lindsell* in particular, had been extensive and was "sufficient" to discredit the rule. Nonetheless, "they [i.e., the judges] stick to it in England as well as in this country. . . . An attempt should be ventured to apply some 'psychoanalysis' to their actions and to look for the 'complex' behind them."[30] While Nussbaum does not himself offer either diagnosis or therapy for the Anglo-American judiciary, his suggestion has considerable merit. Why repeatedly reaffirm a discredited decision or rule which even the judiciary has acknowledged to be arbitrary, if not for some reason which is either repressed, forgotten, or inadmissible? Nussbaum concentrates on the idiosyncracy

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[27] Holwell Sec. Ltd. v. Hughes, 1 W.L.R. 155, 159 (1974).

[28] Rhode Island Tool Co. v. United States, 128 F. Supp. 417, 420 (Ct. Cl. 1955).

[29] *See, e.g.*, Artur Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, 36 COLUM. L. REV. 920 (1936); P.H. Winfield, *Some Aspects of Offer and Acceptance*, 55 LAW Q. REV. 499 (1939); Malcolm P. Sharp, *Reflections on Contract*, 33 U. CHI. L. REV. 211 (1966).

[30] Nussbaum, *supra* note 29, at 922. That Nussbaum, in a paper that originated as a seminar presentation to Karl Llewellyn's contracts class, refers to psychoanalysis should not come as a surprise, considering the influence of Freud upon the realists in the 1930s. For a discussion of this point, see Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175 (1991); *see also* David S. Caudill, *Re-returning to Freud: Critical Legal Studies as Cultural Psychoanalysis*, *in* RADICAL PHILOSOPHY OF LAW: CONTEMPORARY CHALLENGES TO MAINSTREAM LEGAL THEORY AND PRACTICE 45 (David S. Caudill & Steven J. Gold eds., 1995). The foremost realist discussion of psychoanalysis and law is probably JEROME FRANK, LAW AND THE MODERN MIND (1930).

of the rule and adverts to its lack of historical or comparative justification. His purpose is in large measure simply to show (arguably inaccurately) that civil law systems historically have not had such a rule and that there is good reason for that absence.[31]

A recent commentator, Simon Gardner, elliptically takes up Nussbaum's challenge and offers a "deconstruction" of the postal rules in terms of their historical and social contexts of origin. The historical context is that of the nineteenth century reform of the Post Office: the Post Office monopoly, standardized rates, prepayment of postage, and the cutting of letter boxes in doors all merged in the public imagination to equate posting with the certainty of delivery. "The thesis, then, is that the decisions of the 1840s were influenced not so much by internal considerations about offer and acceptance in contract as by a way of regarding the phenomenon of posting as such."[32] Using Trollope's novels as a literary pretext for reformulating the logic of the postal rule, the deconstruction ends by confirming the repressed or at least lost external cause of the rule. "The postal acceptance rule . . . thus stands alone as an exception to a general requirement for full communication. . . . [The] rule may be regarded as something of a museum piece."[33] The fiction, or "artificiality,"[34] whereby the act of posting is treated by simulation "as if" it were a communication of acceptance, is here viewed as anomalous, as "compulsive," and so arbitrary if not necessarily evil. Gardner also recognizes that, like repression itself, the postal rule is likely to return: "[i]t is worth noticing, however, that there is a chance of history repeating itself."[35]

Gardner introduces history and literature to provide an indication of the "real reason" for the rule, but it is arguable that his analysis of the rule does not take the logic of deconstruction—or Nussbaum's suggested psychoanalysis—far enough.[36] As other contributors to the debate over the rule have pointed out, the postal exception may well be more significant than the standard rule.[37] While the rule of full communication suggests a linguistically unrealistic ideology of consensus, the postal rule introduces the

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31 *Compare* Nussbaum, *supra* note 29 *with* David M. Evans, *The Anglo-American Mailing Rule: Some Problems of Offer and Acceptance in Contracts by Correspondence*, 15 INT'L COMP. L.Q. 553 (1966).

32 Gardner, *supra* note 16, at 184.

33 *Id.* at 192.

34 Holwell Sec. v. Hughes, [1974] 1 W.L.R. 155, 157 (Russell, L.J.).

35 Gardner, *supra* note 16, at 192.

36 *See id.* at 176; *see also* Nussbaum, *supra* note 29, at 922.

37 *See* Douzinas & Warrington, *supra* note 16, at 123-25; GOODRICH, *supra* note 16, at 150-52.

objective possibility of the nonarrival of the letter, and faces the consequences of that failure of delivery or noncommunication which constantly threatens to undermine the subjective theory of contracts. The narrative of the nonarriving letter may be likened to Poe's popular story of the purloined letter—the repetition or the endurance of the postal rule serves to recollect or even to cure a general theory of contractual communication which represses the mechanisms, the grammatological and also linguistic means whereby the letter, the *ipsissima verba* of the contract, circulates or finds its destination.[38] The rule of full communication may be seen as part of the blindness of law, the exception as conceptually anterior and liberatory—"[t]he exception comes before the rule in order to put the rule into circulation. The post comes before the prior, the letter before the *phone*, endless circulation before the wealth of tradition, the postal relay before the fixity of meaning and the order of law and politics."[39] What one commentator views as being an inappropriate extension of the ideology of the metaphor of "meeting of minds"—namely, that the offer is made continuously as it travels to the offeree[40]—is represented deconstructively as the precondition for the possibility of contract as such. Where psychoanalysis would assert the priority of the postal rule because it privileged the signifier over the signified, deconstruction would support the postal rule on the basis of a similar inversion of the hierarchical opposition of writing to speech. Deconstruction, then, places the written anterior to the spoken, so that the post indeed represents the "destinal of Being" and the postal rule would thus be the apposite emblem of the discipline of contract as a whole.[41]

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38 The "Purloined Letter" is much discussed within psychoanalysis and also increasingly within law. *See, e.g.*, Jacques Lacan, *Seminar on "The Purloined Letter,"* 48 YALE FRENCH STUD. 39 (1972); JACQUES DERRIDA, *Le Facteur de la Vérité*, *in* THE POST CARD, *supra* note 1, at 413; S. FELMAN, JACQUES LACAN AND THE ADVENTURE OF INSIGHT ch. 2 (1987); David S. Caudill, *Lacan and Legal Language: Meanings in the Gaps, Gaps in the Meaning*, 3 LAW & CRITIQUE 169, 199 (1992).

39 Douzinas & Warrington, *supra* note 16, at 124. The argument comes directly from G.C. CHESHIRE & C.H.S. FIFOOT'S LAW OF CONTRACT 53 (1991):

> [the rule] is perhaps less surprising if we attend to the history of the matter. Adams v. Lindsell was the first genuine offer and acceptance case in English law and, in 1818 there was no rule that acceptance must be communicated. As so often happens in English law, the exception is historically anterior to the rule.

40 This argument is suggested by Farnsworth, *supra* note 22, at 945.

41 *See* DERRIDA, *supra* note 1, at 65.

> If, on the contrary (but this is not simply the contrary), I think the postal and the post card on the basis of the destinal of Being . . . of language, and not the inverse . . . then the post is no longer a simple metaphor, and is even, as the site

There is much in the history of contract, and particularly in the early formbooks such as West's *Symbolaeography*, to support both the psychoanalytic and the deconstructive readings adverted to above.[42] The earliest forms of contract were written obligations adopted and adapted from precedent writings provided by means of

> the [notarial] trade of the making of evidence, and terms thereof, which as they be most ancient, so without doubt are they the surest, and [of] most vailable effect, and a great danger it is for those not exactly learned in the laws to alter or vary from the same.[43]

The contract, *symbolon*, creed, or record, is in legal principle immemorial and immutable—the language of law is in Coke's terms *vocabula artis*, an "unknown grammar,"[44] which circulates perpetually within its own professional genre. The language of legal record, as the "language of memorials," was destined more for posterity than for secular receipt.[45] The written obligation, *assumpsit*, or consensual bond circulated in the external language of durable legal forms. The contract is here a trace or vestige of a structure, of a prior and external agreement, of a code or language of law which precedes and survives its momentary intentional or temporal use. The postal rule, which recognizes precisely the priority of the signifier, of the letter, over the sense or content, directly expresses the logic of common law history. It would be presumptuous in the extreme to suppose that there was any single explanation—historical, literary, philosophical, or psychoanalytic—to this rule. Too much has condensed around the continued metaphor, or properly allegory, of the post and the rule of posting. That the fiction continues to return, that letters bind without being read, that the law treats writing "as if" it were speech—in short, the allegorical narrative of contract by letters—necessarily suggests another scene or unconscious place of judgment.

> of all transferences and all correspondences, the "proper" possibility of every possible rhetoric.

Id.

42 *See* WILLIAM WEST, THE FIRST PART OF SYMBOLEOGRAPHIE: WHICH MAY BE TERMED THE ART, OR DESCRIPTION, OF INSTRUMENTS AND PRESIDENTS, OR THE NOTARY OR SCRIVENER (London, Miles Flesher 1647).

43 T. PHAYR, A NEW BOKE OF PRESIDENTES, IN MANNER OF A REGISTER fol. ii a (London, Whytchurche 1544).

44 SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON sig C 6 a (London, J. More 1629).

45 *See* SIR JOHN DODERIDGE, THE ENGLISH LAWYER: DESCRIBING A METHOD FOR MANAGEMENT OF THE LAWES OF THIS LAND (1631).

The postal rule can be traced to the *Digest*,[46] which in Book 18.1.1.2 states that "sale is a contract of the law of nations and so is concluded by simple agreement; it can thus be contracted by parties not present together, through messengers, or by letters (*per nuntium et per literas*)."[47] In the reception, as Gordley has shown, the glossatorial interpretation of this passage frequently addressed the question of when the contract by "bare messenger" or letter was complete. Accursius, in the *Glossa Ordinaria*, thus takes the view that if the offeree's letter or message of acceptance has been sent, an attempted revocation by the seller before receipt of the acceptance would not be effective.[48]

> To Petrus, Cinus, and Bartolus, the obvious difficulty with this position is that the seller becomes bound to a contract to which he did not consent at the moment it was formed. The issue in Accursius's mind, however, was not whether the seller had consented but the moment at which a communication is effective.[49]

In terms of the postreception development of civil law, the issue raised by correspondence was that of the status of messengers or other agents in communication between absent parties. The question became that of whether a simple or bare messenger could represent a continuing condition or consent to the transaction. The letter, in Alciatus's definition, was a silent messenger (*tacitus nuntius*) and so, out of the power of the sender, it communicated in its own right. By this logic, the offeree was entitled to rely upon the continuing validity of the offer.[50] Gordley mentions one other significant circumstance in which letters are effective even if not received. It is that, according to section 5.17.6 of the *Code*, a marriage can be dissolved by a document that never reaches the other spouse.[51] This last example will prove to be of the utmost importance.

The glossatorial reception of the law of sale has had an indirect impact upon English law.[52] Historical accounts make it clear

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46 References to the Digest and the Code are to those component parts of Justinian's Corpus Iuris.

47 DIG. 18.1.1.2.

48 Gloss to DIG. 18.1.1.2 (*et per literas*) discussed in JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 45-46 & n.62 (1991).

49 *Id.* at 46.

50 *See* ANDREAS ALCIATUS, DE NOTITIA DIGNITATEM 190 (1651).

51 *See* GORDLEY, *supra* note 48, at 46 & n.64.

52 On the position of Roman law in England during the reception, see FRANCIS DE ZULUETA & PETER STEIN, THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200 (1990). Bracton evidences a clear knowledge of glossatorial discussion of the *Digest*, in his analysis of gifts, contracts and obligations. *See* 2 BRACTON, *supra* note 4, at 62-65, 283-90.

that the elaboration of indigenous rules governing assumpsit and covenant were as significant to the development of modern contract doctrine as the earlier inheritance of Roman law.[53] Thus, while it is evident, not least from Gordley's discussion, that the common law of contract was substantially influenced by Roman law, and further that nineteenth century developments were borrowed almost entirely from civil law,[54] the law on "spousals" or marriage contracts has had a significant, if inadequately discussed, impact in this area. In premodern English law, the use of the term contract was often synonymous with marriage, and it was from the law of spousals that many of the doctrines of modern contract law were first taken. In particular, rules relating to capacity, to duress, to consideration, to offer and acceptance *in praesentia* and *in absentia*, to present and future intent, and to the plea of *non est factum* have all developed out of the law of marriage.[55] It should also be emphasized that the law of marriage was subject to the jurisdiction of ecclesiastical courts and judges trained in civil law, and it is that Roman inheritance which the common lawyers subsequently admitted into English law.

The specific point to be made is both simple and surprising. The postal rule, the allegory of the privileged offeree, is the allegory of the law's protection of women up until the point of entry into the effective completion of the marriage contract. Henry Swinburne provides a succinct annotation of the law governing spousals contracted *inter absentes*, by messenger or by letter. He begins by offering a relatively complicated analysis of the formation of spousals. The contract is to be inferred from the words or from manifest intentions, "[f]or what are words but the [m]essengers of men[']s [m]inds? And wherefore serve [t]ongues, but to express men[']s meanings?"[56] The word is already, by this analysis, a species of letter, a symbol of intent which can, however,

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53 *See* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975).

54 *See* A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 LAW Q. REV. 247 (1975); GORDLEY, *supra* note 48, at 161-213.

55 *See* HENRY SWINBURNE, A TREATISE ON SPOUSALS, OR MATRIMONIAL CONTRACTS (London, Robert Clavell 1686); JOHN GODOLPHIN, REPERTORIUM CANONICUM OR AN ABRIDGEMENT OF THE ECCLESIASTICAL LAWS OF THIS REALM CONSISTENT WITH THE TEMPORAL (1678); BARON & FEME: A TREATISE OF THE COMMON LAW CONCERNING HUSBANDS AND WIVES (London, John Waithoe 1700); THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (Holborn, Richard Sare 1724). For a more detailed discussion, see GOODRICH, OEDIPUS LEX; PSYCHOANALYSIS, HISTORY, LAW ch. 6 (1995).

56 SWINBURNE, *supra* note 55, at 63.

be corrected or referred to its precedent cause, the intention of the author or sender. After all, if

> the Parties . . . did *intend* to [c]ontract [m]atrimony, then although the words import no more but [s]pousals *de futuro* [i.e., engagement], the [c]ontract is no less than [m]atrimony . . . but when this meaning doth not appear, then, howsoever the Rude and Vulgar sort do often abuse their terms, and speak improperly, we must be directed by the [rule which says] . . . [w]e must not otherwise depart from the signification of words, but in case it be manifest, that the [s]peaker meant otherwise.[57]

With the stated exception of a manifest dissonance between word and intention, the meaning of the utterance and of its sending is to be construed by law, and not by reference either to illocution or subjective states. Swinburne's analysis of the contract made *inter absentes* thus begins by taking up the glossatorial distinction between proctor and messenger. The proctor is one empowered to "deal in the behalf of the Party from whom he is sent."[58] The messenger, on the other hand, is without warrant or authority but "imployed only about the [e]xpedition of a bare [f]act, as the delivery of a meer [m]essage, or sole postage of a letter."[59] It is hence the instrument itself that is the object of analysis—between whom can the letter legitimately circulate, and who can send and who can receive its message? The question concerns the circulation of the deed, obligation, or fact; the movement of the signifier and not of the signified. The initial inquiry is whether the woman has the capacity to utilize a particular form of acceptance. The question Swinburne addresses next is therefore, "whether the [w]oman may contract [m]atrimony by a special [m]essenger or [l]etters, as well as the [m]an?"[60] Deciding that by canon law she can in principle, Swinburne is then faced with the question, "what if the [p]arty to whom the [m]essage or [l]etter importing [c]onsent of [m]atrimony, being delivered, do immediately upon the receipt thereof express the like [c]onsent, [w]hether is the [c]ontract hereby fully finished?"[61] The answer is that, at the instant of response to the messenger or letter, there is mutual agreement "because the [p]arty which did first consent is still presumed to continue and persevere in the same [m]ind, until the time of the others [c]onsent."[62] In

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57 *Id.* at 64.
58 *Id.* at 178.
59 *Id.*
60 *Id.* at 181.
61 *Id.* at 180.
62 *Id.* at 181.

short, the contract is "perfect" or finished *the moment that the woman* to whom the offer of marriage was sent expresses consent. The offeror cannot, in other words, revoke the offer between the time of consent and the time of receipt of consent. In support of this proposition, Swinburne cites the manifest fiction of "*[i]dem est non esse [et] non apparere* [(][n]ot to be, and not to appear, is all one in [c]onstruction of [l]aw[)]."[63] In other words, if the revocation has not been received, it is taken not to exist. Underlying this construct of consent is the historical relationship of man to woman. It is the woman that benefits from the fiction of continued assent or continuing offer, and it is the woman who is protected by the "artificial" or fictive operation of the postal rule. If in later common law it seems anomalous to protect the offeree, this is only because of the erasure of the face of the offeree; it has been forgotten that it was a woman who put a letter of acceptance in the post.

The question of gender lurks unrecognized in the background of the early development of modern contract law. It is certainly not the sole influence on the evolution of this law, but it should be noted that it is not only the postal rule which survives as a memory of contracting women. Rather, the bulk of rules governing what is now termed the "policing of the bargain" derived in their early operation from the regulation of marriage contracts. It is beyond the scope of the present analysis to examine the particular rules of contract that developed around domestic relations and primarily concern the wife's lack of will and so of capacity,[64] but the unconscious memory of marriage contracts can be seen in the judicial use of hypotheticals drawn from the law of spousals to explain the rules of offer and acceptance. What if a soldier on leave offers marriage by post just before returning to the front? What if a man shouts a proposal of marriage across a river and the offeree's answer is drowned out by a passing steamboat? Baron Bramwell, in *British and American Telegraph Co. v. Colson*, thus asks, "if a man proposed marriage, and the woman was to consult her friends and let him know, would it be enough if she wrote and posted a letter which never reached him?"[65] The answer which Lord Bramwell offers is of less significance than the continued presence of the fe-

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63 *Id.*

64 For a more complete consideration of these rules, see BARON & FEME, *supra* note 55, at 4-6, 214-17; WOOD, *supra* note 55, at 96-103. For an interesting discussion on the related case law, see Copland v. Pyatt, 6 Car. 1 Roll 687, 79 E.R. 814 [n.d.]. For a discussion of the political implications of these rules, see CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

65 British and Am. Tel. Co. v. Colson, L.R.-6 Ex. 108, 118 (1871).

male offeree. The example is not insignificant nor merely hypothetical; rather, it recollects an institutional history, an unconscious structure within which it would be ethically absurd to allow the man to escape his duties and dishonourable in the extreme to leave a woman in suspense or unprotected. The spiritual exemplar of contract has always been that of marriage. In ecclesiastical law, the order of marriage ran from that of the Church to Christ, that of the Priest to the Church, that of the Christian to the creed, and that of woman to man. The hierarchical order of marriages was not only a symptom of the necessary permanence of the contractual institution, it was also a sign, symbol, or credo of an order of communication, of the place of communication in a dialogue in which the sovereign, father, parent, priest, or male suitor or proposer would ask a question or make an offer to which the offeree could only say yes or no. The offeree in this model of contract is powerless in the sense of being brought to speech in a formulaic place, and in being allowed no more than an elective rite. So while the law recognized the minimal duty of protecting the offeree's election, it should not be supposed that this granted the woman offeree any very great or very real right.

CONCLUSION

In place of the simple anomaly of the postal rule, it is possible to offer an account and explanation of the rule which is both more poetic and more sensitive to its political circumstance. In place of the ideal speech situation, or indeed some variant theory of the rational discourse of law, the historical and analytic reconstruction of the postal rule tells a more complicated and less optimistic story. The postal rule always potentially binds the offeror to a contract of which he or she is not aware. The rule binds the parties objectively, and imposes a fiction of consent upon what is potentially a failed communication. At one level, it can simply be observed the rule is an historical residue, a relic whereby the law protects the feminine gender at the point of its entry into an irreversible subjection to the husband. The postal rule, in so protecting the feminine offeree, is itself ironically an exception to the general rule of law, which is that the married woman or *feme covert* has no contractual capacity whatsoever, for husband and wife are one person. In common law, the married woman was *sub potestate viri* or, for Bracton, *sub virga*, or under the rod.[66] The unmarried woman was for a

[66] *See* 2 BRACTON, *supra* note 4, at 36.

considerable portion of time likely to be *in patria potestas*, or under some form of guardianship or wardship.[67] The protection of the woman offered by the postal rule should thus serve to recollect the inequality of the contracting parties and the "civil death" which the marriage contract represented for the feminine offeree.[68]

The illustrative value of the postal rule can be taken somewhat further. Far from simply evidencing the possible failure at the heart of all communication, the postal rule indicates the inequality of communication and offers one potential explanation for the failures of legal meaning. The legal recognition of the rights of the offeree should not hide the nature of the contract to which the offeree is destined to submit. While it is true that the law offered a minimal protection to the woman by recognizing and enforcing premarital contracts or spousals, such that, for example, in *Synge v. Synge* the Queen's Bench enforced a premarital promise of disposition of property by the husband, the general rule was to the opposite effect.[69] Mary Astell, writing in the late seventeenth century and considerably before the decision in *Balfour v. Balfour*,[70] confirmed the modern contractual incapacity of the wife, cogently and proleptically observed that

> covenants between husband and wife, like laws in an arbitrary government, are of little force, the will of the sovereign is all in all . . . thus men happily sign articles relating to property and goods but then retract them, because being absolute master, she and all the grants he makes her are in his power.[71]

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67 *See* RANULF DE GLANVILL, TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE QUI GLANVILLA VOCATUR [THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL] 59 (G.D.G. Hall ed., 1993) (1187).

68 *See* ANON, THE LAWES RESOLUTIONS OF WOMEN'S RIGHTS 2-4 (1632).

69 *See* Synge v. Synge, [1894] 1 Q.B. 466; *see also* Hammersley v. De Biel, 12 Clark & Finnelley 45, 78-79 (1845); 8 Eng. Rep. 1312, 1327:

> If a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he [sic] is not disappointed, and will give effect to the proposal.

Ironically, this decision is in many respects more liberal than that arrived at via current state law in New York. *See, e.g.*, Morone v. Morone, 50 N.Y.2d 481 (1980).

70 [1919] 2 K.B. 571, 579 ("In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."). Underlying this sentiment is also, of course, a fear of conflict between sovereign and prerogative rights. *Regia potestas* would vie with *patria potestas*.

71 MARY ASTELL, SOME REFLECTIONS UPON MARRIAGE 38 (London, William Parker 1730).

The model of communication offered by the postal rule and affirmed by the legal incapacity of the wife is one of an explicitly hierarchical and predetermined series of enunciative positions. The slave or the wife or the offeree can communicate—they have an *animus* or will (*voluntas*)—but the law will only recognize their speech or writing within the preestablished terms of licit transmission. While the postal rule can be used to indicate that there are indeed circumstances under which the woman or the subordinate can communicate and bind in law, it is equally indicative of the powerlessness of the feminine offeree after the contract has been made. It allows us to observe that the woman is granted a final request, but it does not fit easily into the model of communicative rationality. It offers instead a vision of speech and of writing by position, a bureaucracy of intentions rather than a poetics of transmission. In strict historical and doctrinal terms, it has to be reiterated that the model of legal communication to which the postal rule forms a limited exception is one which denies the validity of domestic contracts, which refuses to grant legal status to promises defined as belonging to the private sphere, and which does not recognize the juridical personality of the woman in the context of the home. It should be reiterated also that the doctrinal context of the postal rule can only be reconstructed through the recognition of the unequal legal background of the parties communicating by post. The postal rule makes legal sense only if it is analyzed in terms of the inequality of speech situation and specifically in terms of difference of gender.

The postal rule indicates again, if such is really necessary, that, where communication is to have the power to bind or *potestas ligandi*, where it is a question of social authority and of the political significance of communication, the model of transmission that is heuristically relevant is one which recognizes more than the placid comfort of the unhurried and unconstrained speech situation. The model is one which critically observes the law's depiction of the place and power of the communicative parties. It is finally a model that moves some way towards recognizing that the rules which govern the potential failure of all transmission, which legislate the arrival of even those letters that do not arrive, or alternatively indulges in the fiction of the success of the lost or purloined missive, are far from ideal and somewhat less than rational. It is, in sum, appropriate and commendable that a theorist of communicative rationality and of ideal speech situations should turn to the analysis of law and to legal forms of constitution and communication. It is less com-

mendable that, in turning to law and to the discourse of law, Habermas evinces no knowledge either of the specific qualities of legal discourse or of the substantive rules which govern legal communication.